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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Applications of)
)
)
NORMANDY BROADCASTING CORP.)
)
For Renewal of License of)
Station WYLR(FM))
Glens Falls, New York)
)
and)
)
)
LAWRENCE N. BRANDT)
)
For A Construction Permit)
For a New FM Station)
Glens Falls, New York)

MM DOCKET NO. 92-6

File No. BRH-910129UR

File No. BPH-910430MB

To: Administrative Law Judge
Richard L. Sippel

MASS MEDIA BUREAU'S COMMENTS ON
MOTION FOR SUMMARY DECISION

1. On April 7, 1992, Lawrence N. Brandt ("Brandt") filed a Motion for Summary Decision of the following issue specified against Normandy Broadcasting Corp. ("Normandy"):

To determine whether the findings and conclusions about the character qualifications of Normandy in Barry Skidelsky, 6 FCC Rcd 2221 (ALJ 1991), should disqualify Normandy in the Glens Falls renewal proceeding.

The Mass Media Bureau submits the following comments.

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2. The Bureau does not support Brandt's Motion at this time. We agree that the findings and conclusions with respect to Normandy's qualifications, which were made in the Initial Decision in Barry Skidelsky, supra, cannot be revisited, and that Normandy is bound by the findings and conclusions in the Initial Decision. See United Broadcasting Co., 49 RR2d 597, 605 n. 35 (1981). Nevertheless, we do not agree that the foregoing issue is now ripe for summary decision.

3. In response to the Bureau's Petition for Reconsideration, the Review Board, in Barry Skidelsky, 7 FCC Rcd 1392 (Rev. Bd. 1992), set forth the scope of the issue to be considered in the instant case. While making clear that the findings and conclusions in the Barry Skidelsky Initial Decision would be binding, the Review Board also observed that, in a similar case, Ocean Pines FM Broadcasting Partnership, 4 FCC Rcd 3490 (Rev. Bd. 1989), additional, exculpatory evidence was received.

4. We believe that Normandy is entitled to adduce evidence here, provided it is shown to be new, i.e., that it could not have been adduced in the Barry Skidelsky case, and exculpatory. Moreover, we opine that Normandy should have the opportunity to make a showing to mitigate the conclusions in Barry Skidelsky.

5. The Bureau submits that our view is not inconsistent

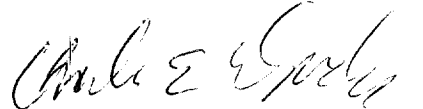
with KOED, Inc., 5 FCC Rcd 1784 (1990), subsequent history omitted, and WIOO, Inc., 95 FCC 2d 974, 983 (1983), two cases cited by the Review Board in Barry Skidelsky, 7 FCC Rcd at 1393. In KOED, at 1785, the Commission rejected evidence of meritorious programming in mitigation of the specific misconduct involved there, which included misrepresentation and lack of candor. However, it did not hold that other kinds of evidence going to mitigation would not be permitted. In WIOO, the proffered evidence was neither new nor in the nature of mitigation. Instead, it went to the heart of the previous findings. We are not suggesting that evidence should be permitted here which attempts to overturn the earlier findings.

6. United Broadcasting Co., supra, at 604, holds that collateral estoppel precludes the relitigation of those matters which were actually at issue in the earlier proceeding. Nevertheless, the Commission there made clear, at 603, that mitigating evidence may be introduced. It also stated, at 602, that:

a broadcaster's loss of one license does not invariably compel the conclusion that grant of another license to that same broadcaster would be contrary to the public interest.

7. Accordingly, the Bureau opposes the Motion for Summary Decision at this time.

Respectfully submitted,
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April 21, 1992

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 21st day of April, 1992, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Comments on Motion for Summary Decision"** to:

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